October 22, 2003

Commissioners:

There seems to be a face-off between BPL interests and the over-the-air users of any spectrum from HF to low VHF who claim widespread BPL will cause intolerable levels of interference to their services. Radio amateurs (I am one) support their own position with standard science and monitoring of BPL tests by the ARRL showing a probable increase in the noise floor of 50 to 66 dB from neighborhood BPL. (That's a factor of 100,000 to 4 million when one converts decibels to a multiplication factor.) The BPL companies have some blustery lawyers claiming there will be no interference, and their PR campaign has got the FCC excited in promoting BPL *sans test results or any theory to support their contention it will be interference free (or even tolerable).* I am reminded of a piece of a story.

> "We're going to see about that, Fitzpatrick," he said. "Fort Worth is in Texas, too. And down there in our lawyers'—our *Texas* lawyers'—offices—right now—a brief is being prepared to move you people off to a safe distance where you won't interfere with this project."
>
> "You mean," Carl took up the challenge immediately, "off to where our legal right to congregate and," he pointed the gnawed bone again toward Grissom's face and spoke in a deep and serious tone, "*peacefully assemble* won't be violated?" He smiled at the crowd, who fell silent. "Our *constitutional* right? Is that what you mean, Mr. Grissom?"
>
> There was no applause this time, merely a low undertone of muttering. Tension grew in the crowd. Grissom removed his hat and furiously mopped his brow. His hair was slick with sweat.
>
> "Honey," Lydia shrilled from the lowboy, "do you want some cole slaw with your chicken?"
>
> "Here, just as in Fort Worth or, I suspect, in Chicago, Mr. Grissom," Carl wound up for an exit line, "we practice "*American constitutional* law. The same law that not a few of these folks have fought for on foreign soil." He grinned at the alliteration. "The same law that many of these women have sacrificed husbands, brothers, and sons for. That's the law we practice here, Mr. Grissom. Not railroad law. Not corporate law. Not Chicago law or even Fort Worth law. We practice the law of these United States. The Bill of Rights! And you'd do well not to forget that! In the meantime, you're interrupting our lunch, so I'll bid you good day."[1]

I'd like to point out that unless you the FCC put the kibosh on BPL, it and its severe interference will spread to where licensed radio amateurs will be unable to peacefully assemble on the airwaves—HF to low VHF being the practical spectrum for accomplishing that on a national level—which is contrary to the American Bill of Rights that many hams and their relatives fought in wars to defend. Maybe to some corporate law that doesn't matter, but I'm not talking corporate law but U.S. law.

[1]Clay Reynolds, Monuments (Lubbock: Texas Tech University Press, 2000) pp. 66f.

I will grant that BPL is a new technology, but we may learn something about how Americans should treat freedom of assembly vis-à-vis BPL by seeing how the Court treated freedom of speech vis-à-vis broadcasting.

# ACCESS TO THE NEWS MEDIA[2]

*Red Lion Broadcasting Co.* v. *FCC*
395 U.S. 367 (1969)

Mr. Justice White delivered the opinion of the Court.

The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine, which originated very early in the history of broadcasting and has maintained its present outlines for some time. It is an obligation whose content has been defined in a long series of FCC rulings in particular cases, and which is distinct from the statutory requirement of § 315 of the Communications Act that equal time be allotted all qualified candidates for public office. . . .

**The broadcasters challenge** the fairness doctrine and its special manifestations in the personal attack and political editorial rules on conventional First Amendment grounds, alleging that the rules abridge their freedom of speech and press. Their contention **is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency.** No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents. This right, they say, applies equally to broadcasters. . . .

. . . **It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.**

. . . No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 227 (1943).

. . . There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

This is not to say that **the First Amendment** is irrelevant to public

[2]Wallace Mendelson, Professor of Political Science, The University of Texas at Austin, The American Constitution and the Judicial Process (Homewood, IL: The Dorsey Press, 1980) pp. 436-437.

> broadcasting. On the contrary, it **has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with "the right of free speech by means of radio communication."** Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But **the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment.** It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee. ... **It is the right of the public to receive suitable access to social,** political, **esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC. ...**

The radio spectrum is a "scarce" and "unique" medium. We private citizens may communicate by means of our own transmitters and receivers after being licensed by passing a test in radio law, radio electronic theory, and proficiency in the international morse code. The FCC is allowed to test us so because of the scarcity of the medium and so we do not crowd each other out. After that we have freedom of noncommercial speech to discuss "social, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."

The broadband and internet services that want to use the same frequencies with miles and miles of powerline antennas and enough accumulated power to cause devastating interference are not limited to the scarce resource of our over-the-air spectrum. No, their powerline transmission schemes are but *one* means of conveying their information, in competition with other means. What I am saying is that your job is to keep us from getting in each other's hair and to make communication possible, to which end you are to even encourage new technologies. The new technologies that would succeed in conveying high speed internet and broadband services sans interference to radio users are coaxial cable, fiber optics, and microwave terrestrial and satellite service.

And isn't it curious how this BPL service which is supposedly interference proof just happens to fall from right above the AM radio dial to right below the FM one, and below half of VHF TV? Why is that? I mean, if it doesn't cause any interference, why not use AM and FM radio frequencies too? We can find a clue in this survey:

**LEISURE TIME**[3]

*Television and radio are the top media choices for college students.*

| Percentage of College Students Who: | 0 | 25 | 50 | 75 | 100 |
|---|---|---|---|---|---|
| Watch TV in a typical week | | | | | 94% |
| Listen to radio in a typical week | | | | | 90% |
| Read a magazine occasionally | | | | | 82% |
| Have watched cable or satellite TV most often | | | | | 79% |
| Read 1 of the last 5 issues of the campus paper | | | | | 72% |
| Read 3 of the last 5 issues | | | | | 42% |
| Read national newspaper weekly | | | | | 40% |
| Watched campus TV in the past month | | | | | 36% |
| Read national online weekly | | | | | 23% |
| Listen to campus radio station in the past week | | | | | 13% |

Ah, radio and TV. Very very popular. Best not disturb the people. Find some easier pickings.

Okay, here's an idea. The BPL companies say their service will be interference free. The radio amateurs say it will create interference of monstrous proportions. So what we do is this. The hams don't have all that much spectrum. We ban BPL from using any of it, even subharmonics of ham frequencies. To compensate them for not using amateur frequencies, we let them use AM and FM broadcast frequencies. After it has been shown that they do not interfere with the less sensitive receivers and smaller antennas broadcast services, maybe we can see about letting them move onto the more sensitive receivers and bigger antennas amateur frequencies.

Respectfully Submitted,
Earl S. Gosnell III

[3]Source: *Student Monitor*, Fall 2002, reprinted in *Young Money*, Aug/Sept 2003, p. 23.